

143268

MAYER, BROWN & PLATT

1909 K STREET, N.W.

WASHINGTON, D.C. 20006-1101

Adam C. Sloane

DIRECT DIAL: (202) 263-3269

DIRECT FAX: (202) 263-5269

ASLOANE@MAYERBROWN.COM

01/01-9 11
111 6-10210
DIRECT DIAL: (202) 263-3269
MAIN PHONE
(202) 263-3000
MAIN FAX
(202) 263-3300

October 24, 2001

By Hand

George Entwistle
Chief, Certification Branch, Office of Vehicle Safety Compliance
National Highway Traffic Safety Administration
400 Seventh Street, S.W., Room 6111
Washington, D.C. 20590

Re: Docket No. NHTSA-2001-10526 -4

Dear Mr. Entwistle:

Ferrari North America, Inc. ("FNA"), through its undersigned counsel, hereby submits its comments upon the petition of J.K. Technologies ("JKT") in the above-referenced docket for a decision that nonconforming 1999 Ferrari F355 Passenger Cars are eligible for importation. FNA, which is the authorized importer and distributor of Ferrari automobiles in the United States, has analyzed JKT's petition and has discovered significant errors and omissions in that petition. These errors and omissions preclude JKT from carrying its burden of establishing that the vehicles it seeks to import are substantially similar to the Ferrari vehicles that were originally manufactured and certified by Ferrari SpA for importation and sale in the United States. *See* 49 U.S.C. § 30141(a)(1)(A)(i)-(iii); *see also* 49 C.F.R. § 593.5(a)(1)(i). In addition, JKT has not established that the vehicles it seeks to import are "capable of being readily altered to comply with applicable motor vehicle safety standards." 49 U.S.C. § 30141(a)(1)(A)(iv); *see also* 49 C.F.R. § 593.5(a)(1)(ii).

INTRODUCTION

JKT's petition rests on the alleged "substantial similarity" between the vehicles that it seeks to import and Ferrari vehicles that were originally manufactured and certified by Ferrari SpA for sale in the U.S. market. A vehicle that was not originally manufactured to conform to Federal motor vehicle safety standards may be eligible for importation into the United States if it is demonstrated that the vehicle (a) is "substantially similar to a vehicle which was [both] originally manufactured for importation and sale in the United States" and certified by the

CHARLOTTE CHICAGO COLOGNE FRANKFURT HOUSTON LONDON
LOS ANGELES NEW YORK PALO ALTO PARIS WASHINGTON
INDEPENDENT MEXICO CITY CORRESPONDENT: JAUREGUI, NAVARRETE, NADER Y ROJAS

George Entwistle
October 24, 2001
Page 2

original manufacturer as complying with applicable Federal motor vehicle safety standards, and (b) “[i]s capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.” 49 C.F.R. § 593.5(a)(1)(i); *see also* 49 U.S.C. § 30141(a)(1)(A).

This agency’s regulations and previous decisions on import petitions make it clear that the burden of proof with respect to the eligibility of vehicles for importation is on the *petitioner*. *See, e.g.*, 49 C.F.R. § 593.6(a)(4) (petitioner must present “[d]ata, views and arguments *demonstrating* that the vehicle identified by the petition under paragraph (a)(1) of this section is substantially similar to the vehicle identified by the petitioner under paragraph (a)(2) of this section”) (emphasis added); 49 C.F.R. § 593.6(a)(5) (petitioner must present “data, views, and arguments *demonstrating* that the vehicle identified by the petition under paragraph (a)(1) of this section either was originally manufactured to conform to such standard, or is capable of being readily modified to conform to such standard”) (emphasis added); Denial of Petition for Import Eligibility Decision, 62 Fed. Reg. 18,385, 18,386 (Apr. 15, 1997) (stating that petitioner seeking eligibility determination for various GMC and Chevrolet Suburban MPVs “had the burden of producing information to demonstrate” compliance, and finding, in light of General Motors’ showing that the vehicles sought to be imported had 750 parts that differ from the U.S. certified versions of the vehicles, that petitioner had failed to make the requisite showing).

JKT has failed to meet the burden of proving either substantial similarity or ease of modification. To the contrary, as we show below, there are substantial grounds to doubt that the vehicles that JKT seeks to import through its petition are substantially similar to Ferrari vehicles that were originally manufactured and certified for sale in the U.S. market. Furthermore, JKT has failed to establish that the cars are readily modifiable to conform to all of the pertinent Federal motor vehicle safety standards.

SUBSTANTIAL SIMILARITY

NHTSA has not defined “substantial similarity” in the import eligibility context. When it promulgated 49 C.F.R. Part 593, NHTSA noted that Congress had not defined the term, either. *See Determinations That a Vehicle Not Originally Manufactured to Conform to the Federal Motor Vehicle Safety Standards Is Eligible for Importation*, 54 Fed. Reg. 40,093, 40,095 (Sept. 29, 1989). NHTSA recognized, however, that vehicles that appear to be similar may have substantial “under-skin” differences that are not readily apparent, “and these factors may have to be taken into account in petitions and determinations.” *Id.* at 49,096.

Here, there are numerous “under-skin” structural differences between the 1999 Ferrari F355 Passenger cars that are manufactured for sale in the U.S. and those that are not: differences that relate directly to Federal motor vehicle safety standards.¹

¹ This issue is somewhat complicated by the fact that, with respect to some features, not only are there differences between Ferrari vehicles that are manufactured and certified for the

George Entwistle

October 24, 2001

Page 3

For instance, there are differences in bumper design and strength between the U.S. and Canadian versions of the F355s, on the one hand, and European versions, on the other. In addition, the U.S. and Canadian versions of the F355s have specially welded, high-resistance steel side impact bars to comply with FMVSS No. 214, but F355s manufactured for other markets do not have such side impact bars. The wiring of the U.S. versions of the F355s is also specific to those versions.

Weight is another significant difference between the U.S. and non-U.S. versions of the F355s. The U.S. and Canadian versions of the F355s weigh approximately 44 lbs. more than many of the F355s made for other markets.

Finally, as set forth in the attached confidential appendix, there are approximately 170 parts related to motor vehicle safety that are installed on U.S. (and, in some cases, Canadian, Australian, and/or South American) versions of the F355s that do not appear on non-U.S. (and/or non-Canadian) F355s.²

U.S. market and those that are not, but there also are differences among Ferraris produced for non-U.S. markets. Thus, JKT should have identified the particular versions of the F355s that it is comparing to the U.S. versions by specifying the Vehicle Identification Numbers ("VINs") of the vehicles that JKT proposes to import. Without this information, which JKT failed to provide, it is not possible to fully assess the merits of JKT's petition. Because JKT has the burden of proof with respect to substantial similarity and ease of modification, it cannot be *assumed* that the nonconforming cars are substantially similar and easily modifiable. To the contrary, in the absence of the specific vehicle identifying information that JKT failed to provide, the agency should conclude that JKT has *failed* to carry its burden. The failure to include the pertinent VINs not only makes it difficult to comment upon and evaluate JKT's petition (for the reasons explained above), but also appears to violate various NHTSA's guidances for Registered Importers. See Registered Importer Newsletter No. 1 (Mar. 15, 1994) ("Vehicle Identification Numbers (VIN) Required On All Petitions"); Registered Importer Newsletter No. 3 (May 27, 1994) ("When you do make physical comparisons, your petition must include make, model and VIN of both vehicles.").

² The attached confidential appendix list the relevant parts by reference to applicable federal motor vehicle safety standards, and also includes a listing of additional safety-related parts that could not be readily categorized by reference to a particular motor vehicle safety standard. As will be evident, not all of the safety standards listed in the appendix are discussed in this letter's section on "Capability of Being Modified" because, with respect to a number of the safety standards, FNA concluded that a registered importer as skilled as JKT holds itself out to be might be able to "readily" install the parts needed to modify the vehicle to achieve compliance with the safety standard. Nonetheless, the parts and pertinent safety standards merit inclusion in the appendix because an exhaustive listing of safety-related part differences between U.S. and non-U.S. versions of the F355s is helpful for assessing whether the nonconforming

George Entwistle
October 24, 2001
Page 4

Because of these significant differences between U.S. and most non-U.S. versions of the F355s, the vehicles that JKT seeks to import cannot be deemed to be "substantially similar" to the U.S. versions of those vehicles. The structure and background of the statute and regulations demonstrate that a would-be import is "substantially similar" to a vehicle manufactured and certified for the U.S. market only if the import would require comparatively minor and straightforward modifications in order to comply with Federal motor vehicle safety standards. Where, however, it would be necessary to crash test or engage in other extensive certification testing or modeling to assure that the modified import complies with Federal motor vehicle safety standards, the would-be import cannot be deemed to be substantially similar to a vehicle originally manufactured and certified for the U.S. market.

Thus, as the Agency explained in the preamble to the regulation, "the 1988 Act assumes that full conformance with the safety standards may be more difficult to achieve for a non-similar vehicle than for a vehicle that is 'substantially similar' to a certified one, as it states that NHTSA's determination shall be 'based on destructive test data or such other evidence as the [Administrator] determines to be adequate'. In this instance, it would appear that far more detailed information might be required to demonstrate capability of modification * * * ." 54 Fed. Reg. 40093, 40096; *see also, e.g.*, Registered Importer Newsletter No. 10 (Dec. 20, 1996) ("When a vehicle is petitioned on the basis that it is capable of being modified – no substantially similar U.S. vehicle, test data must be submitted to demonstrate that the vehicle complies or will comply after modifications are made.").

Here, the differences between U.S.- and non-U.S.-specification F355s are so significant that extensive testing, including crash testing, would be required to determine whether the modifications proposed by JKT would, in fact, ensure that the vehicles comply with Federal motor vehicle safety standards. Thus, testing would be needed to determine whether JKT has correctly installed new side impact bars into the non-U.S. vehicles so as to achieve compliance with FMVSS No. 214. In addition, the lighter bumpers on the non-U.S. versions have not been subjected to the crash-testing used by Ferrari to evaluate compliance with Federal motor vehicles safety standards. Such testing would be required to determine whether the modified vehicles that JKT seeks to import comply with Federal motor vehicle safety standards.

Thus, there are significant differences between U.S.- and non-U.S. versions of the Ferrari F355s with respect to "under-skin" characteristics, and extensive documentation and testing would be required to assure that JKT's modifications have succeeded in bringing the non-U.S. vehicles into compliance with Federal motor vehicle safety standards. Accordingly, the Agency

vehicles are substantially similar to U.S. versions of the F355s. An exhaustive listing also is helpful in determining whether, taken as a whole, the process of modifying the nonconforming vehicles would be so massive that the vehicles could not be considered readily modifiable to achieve compliance with all motor vehicle safety standards.

George Entwistle
October 24, 2001
Page 5

should determine that JKT has failed to meet the burden of proof with respect to the issue of substantial similarity.

CAPABILITY OF BEING READILY MODIFIED

JKT also has failed to establish that the non-U.S. versions of the F355s are capable of being readily modified to meet U.S. federal motor vehicle safety standards.

FMVSS No. 208: JKT fails to note that there are differences between U.S. versions of the F355s and the nonconforming vehicles with respect to twelve parts directly relating to FMVSS No. 208 (and/or FMVSS No. 209). Thus, JKT claims that the seat belts in non-U.S. versions of the F355 are identical to those in the U.S. versions. This is incorrect. The seatbelts for the U.S. versions are different from those of other versions with respect to labeling and the childseat ratchet mechanism.

FMVSS No. 214: JKT claims that the door bars in the nonconforming vehicles are identical to those in the U.S. versions of the F355s. This claim also is incorrect. Only the U.S. and Canadian versions of the F355s are equipped with specially designed side impact bars in order to meet the requirements of FMVSS No. 214. These bars would have to be installed on the non-U.S. versions of the F355s. JKT appears to assume that it would be a simple matter to add side impact bars to vehicles that lack them (presumably by removing the door panel on the *inside* of the door in order to attach a side impact bar). This assumption is incorrect. Ferrari uses high-resistance steel bars on its F355s. These side impact bars are precisely welded into a specified position in the door *from the outside* prior to the application of the sheet metal skin and paint. The installation of the side impact bars from the *outside* of the door appears to be crucial to their proper performance. In tests conducted by Ferrari, it was determined that side impact bars installed from the *inside* of the door do *not* provide sufficient protection to meet the requirements of FMVSS No. 214. Thus, in order to meet the requirements of FMVSS No. 214, JKT would need to install the side impact bars from the *outside* by removing the door's paint and outside metal skin, welding the high-resistance bar into place (assuming that JKT could locate and purchase such side impact bars, which are not available as replacement parts from FNA or Ferrari SpA), and then reattaching the skin and repainting the door. Moreover, to achieve compliance with FMVSS No. 214, the side impact bars must be specifically and precisely positioned and expertly welded. By no stretch of the imagination, then, may the installation of side impact bars render the non-U.S. F355s *readily* modifiable to comply with FMVSS No. 214, and JKT has provided no basis for concluding that it can achieve compliance with FMVSS No. 214 through its own installation of side impact bars. In fact, the only way to achieve compliance with FMVSS 214 is to completely replace both the driver and passenger doors.³ The replacement of the doors would require two parts, costing a total of \$3,565.94.

³ FNA made a similar point with respect to two other petitions filed by JKT (concerning MY 2001 Ferrari 360s and 550s). JKT's response, remarkably, was "who cares?" See JKT

George Entwistle
October 24, 2001
Page 6

FMVSS No. 301: Contrary to JKT's assertions, the layout and many components of the U.S. F355s fuel system are different from those of the non-U.S. versions. The U.S. fuel system has passed specific crash tests to verify compliance with FMVSS No. 301. The non-U.S. versions have not been so tested. Nevertheless, JKT apparently believes that, regardless of the differences between the fuel systems of the U.S. and non-U.S. versions of the F355s, the non-U.S. versions meet the requirements of FMVSS No. 301 because they have a rollover valve and check valve. This view is incorrect. The rollover and check valves are not the only safety-related elements of the fuel system necessary for compliance with FMVSS 301. Consequently JKT has failed to satisfy its burden of establishing that the non-U.S. vehicles comply with, or are readily modifiable to comply with, FMVSS No. 301.

49 C.F.R. Part 581: In its petition, JKT states that the "bumpers and the support structure for the bumpers on these vehicles are the same as the U.S. model." Petition at 6. This assertion is incorrect. The U.S. F355s' front and rear bumpers, along with the corresponding supports, are different from the non-U.S. versions. Thus, JKT fails to note that the U.S. bumpers are stronger and heavier than those of the nonconforming vehicles, and fails to mention the presence on the U.S. versions of a rear bumper support trestle assembly and two protective rear heat shields on the rear bumper. Perhaps recognizing that its assertion is unsupportable, JKT's petition concedes that the nonconforming F355s require modification, noting that JKT adds "small braces for support of the corner area's [sic]. Our enhanced crash programs have shown there 'could be' a support problem. To avoid any problems in the future we have reinforced these area's [sic]." *Id.* JKT's cryptic references to "enhanced crash programs," the fact that

letter to George Entwistle, dated October 4, 2001, at 2. Apparently recognizing that such a glib response to a motor vehicle safety-related concern would be insufficient, JKT went on to state that it had designed and installed side impact bars on other vehicles and performed crash tests with respect to them. But what JKT did *not* say is telling: JKT did not say that it had crash tested *Ferrari* cars with JKT-installed side impact bars. The fact (if it is a fact) that JKT may have met the standards of FMVSS No. 214 by installing side impact bars on *other* cars does not prove that its design and installation of side impact bars would bring nonconforming *Ferrari* cars into compliance with the standard. Moreover, in its petition with respect to the F355s, JKT does *not* assert that it will design side impact systems for the F355s. To the contrary, JKT claims that it will purchase the appropriate side impact bars "from the manufacturer" (Petition (in Docket No. 10526) at 6), a contention that ignores the fact that these side impact bars are not available as replacement parts from FNA or Ferrari SpA. Moreover, even if these bars were obtainable as replacement parts, this would not support JKT's argument. To the contrary, as we have discussed, Ferrari testing on the particular side impact bars used in the U.S. versions of Ferrari vehicles has shown that the side impact bars must be installed from the outside in order to achieve compliance with FMVSS No. 214 – an undertaking that is so technically difficult and expensive on a finished vehicle that it renders the vehicle not readily modifiable to conform to motor vehicle safety standards.

George Entwistle

October 24, 2001

Page 7

there “‘could be’ a support problem,” and its “reinforce[ment] [of] these areas” make it difficult to comment on JKT’s claims. It appears clear, however, that JKT has merely asserted that its proposed modifications of the non-U.S. bumpers are adequate, and, beyond this assertion, JKT has not, to our knowledge, submitted any data or arguments regarding the adequacy of its proposed bumper modifications. Consequently, JKT has not met its burden of demonstrating that its proposed modifications readily achieve compliance with the 49 C.F.R. Part 581.

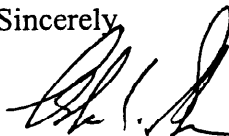
CONCLUSION

As we have shown, JKT’s petition contains numerous omissions and errors, calling into question JKT’s ability to modify Ferrari cars to comply with U.S. motor vehicle safety standards. There are numerous differences between the U.S. and non-U.S. versions of the F355s, which render the nonconforming vehicles that JKT seeks to import neither substantially similar to the U.S. versions nor readily modifiable to conform to U.S. motor vehicle safety standards.

In addition, we have shown that, in many cases, the replacement of the pertinent non-U.S. parts with U.S. parts would be technically difficult, laborious, and expensive. JKT, however, has acknowledged *neither* the magnitude of the differences between the vehicles that it seeks to import and the vehicles that Ferrari SpA has manufactured and certified for sale in the U.S. *nor* the complexity of the modifications needed to achieve compliance with Federal motor vehicle safety standards.

Thus, JKT has failed to satisfy its burden of proof with respect to the substantial similarity issue, and also has been unable to demonstrate that the non-U.S. Ferrari F355s may readily be modified to conform to Federal motor vehicle safety standards. Accordingly, FNA respectfully requests that JKT’s petition for import eligibility determination be denied.

Sincerely,



Adam C. Sloane

Enclosure

CONFIDENTIAL APPENDIX
FILED WITH THE OFFICE OF CHIEF COUNSEL